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No. 78-225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
Appellants,

v.

UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully moves this Court, pursuant to Rule 42(1) of the Rules of this Court, for leave to file the accompanying brief as *amicus curiae* in support of the position of the appellees in this case.

INTEREST OF THE AFL-CIO AND ISSUES TO BE COVERED IN THE BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of national and international labor organizations, including appellee, United Farm Workers of America, representing approximately 13,500,000 employees throughout the United States.

Most employees in the United States work for employers who are covered by labor relations statutes which, whatever we may consider to be their imperfections, at least recognize the principle of free collective bargaining. In grim contrast, the agricultural workers of the State of Arizona, some of whom, with their union, are plaintiff-appellees in this case, are subject to a statute which gives only lip service to that principle, hedging about its exercise with onerous and lengthy delays, and in almost every conceivable detail placing the authority of the state on the side of the employers who are anti-union.

The issues unique to this legislative throwback to an era which we had thought long past are discussed in the brief of the appellees who bring to that discussion immediate experience we do not share. But there is at least one constitutional issue in this case which has potential significance beyond the context of the Arizona statute involved herein, and as to which we believe we can provide some additional insight. We refer, and devote the brief we tender, to § 1385 (B)(8) which contains a sweeping prohibition against publicity which induces or encourages consumers not to purchase particular produce. Our brief discusses the constitu-

tionality of that provision in light of the principles declared in this Court's most recent decisions elaborating upon the meaning of the First Amendment.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in the case is set forth in that motion.

ARGUMENT

So long as members of the general public enjoy the freedom to buy what they want, where they want, public discussion criticizing a seller's business methods and urging consumers on the basis of that criticism not to buy enjoys the full measure of First Amendment protection, as we now show.

A. Two of the First Amendment decisions rendered this past term reaffirm the basic free speech tenets applicable

here. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, is the first of these:

> The speech proposed by appellants is at the heart of the First Amendment's protection.
>
> > "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940).
>
> The referendum issue that appellants wish to address falls squarely within this description. In appellants' view, the enactment of a graduated personal income tax, as proposed to be authorized by constitutional amendment, would have a seriously adverse effect on the economy of the State. See n. 4, *supra*. The importance of the referendum issue to the people and government of Massachusetts is not disputed. Its merits, however, are the subject of sharp disagreement. [435 U.S. at 776-777.]

The paragraph in *Thornhill* following the one quoted in *Bellotti* also speaks directly to the question presented here:

> In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague* v. *C. I. O.*, 307 U.S. 496; *Schneider* v. *State*, 308 U.S. 147, 155, 162-63. See *Senn* v. *Tile Layers Union*, 301 U.S. 468, 478. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an

> importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. We concur in the observation of Mr. Justice Brandeis, speaking for the Court in *Senn's* case (301 U.S. at 478): "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." [310 U.S. at 102-103.]

In Re Primus, 436 U.S. 412, adds the following insight:

> Appellant's letter of August 30, 1973, to Mrs. Williams [communicating an offer of free assistance by attorneys associated with the ACLU] thus comes within the generous zone of First Amendment protection reserved for associational freedoms. The ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public. See n. 32, *infra*.; cf. *Bates* v. *State Bar of Arizona*, 433 U.S., at 364; *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 779-780 (1976) (STEWART, J., concurring). As *Button* indicates, and as appellant offered to prove

> at the disciplinary hearing, see n. 9, *supra,* the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants. " 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas* v. *Collins,* 323 U.S. 516, 537 (1945). The First and Fourteenth Amendments require a measure of protection for "advocating lawful means of vindicating legal rights," *Button,* 371 U.S., at 437, * * *. [436 U.S. at 431-432.]

In *Thomas* v. *Collins,* the effort to "persuade to action" was a "speech [whose] whole object was publicly to proclaim the advantages of workers' organization and to persuade workmen to join Local No. 1002 as part of a campaign for members." (323 U.S. at 533.) In determining that Texas could not restrain such persuasion, the Court noted "Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection." (*Id.* at 538.)

Commercial activity generates not only a stream of goods and services but a series of significant social issues. Businessmen are both participants in the public dialogue and its subject. Their decisions—concerning such matters as collective bargaining, equal employment opportunity, the use and preservation of natural resources, the maintenance of the environment, the location of facilities in one area of the country or another or in a foreign country, the doing of business with repressive regimes, support for or opposition to government action—directly and immediately affect each of us. The precedents just reviewed make it plain that precisely because that is so, speech on these subjects, including speech designed to persuade to action, is "at the core of the First Amendment's protective ambit" (*Primus,* 436 U.S. at

424) and the "constitutionality of any prohibition * * * turns on whether it can survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech" (*Bellotti,* 435 U.S. at 786).

B. (1) The State's justification for § 1385(B)(8) of the Arizona Act is that it is a "Prohibition Against False Secondary Consumer Pressures." (App. Br. 58, Heading.) While it is not wholly inconceivable that the Arizona Supreme Court would "mak[e] this law a nose of wax, to be changed from that which the plain language imports" (*Yu Cong Eng* v. *Trinidad,* 271 U.S. 500, 514), and while such a construction would be binding on this Court, the District Court understandably read the provision as it was written. And, so read that section is by no means limited to false secondary consumer pressures.

The first sentence prohibits all "dishonest, untruthful and deceptive publicity"—whether it be primary or secondary. The remainder of the provision, which declares what is and what is not "permissible inducement or encouragement," adopts a highly restrictive and idiosyncratic notion of what is false and of what is secondary pressure.[1]

For example, the last sentence of this section expressly excludes publicity directed against any "trade mark, trade name or generic name which may include agricultural prod-

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[1] We, of course, recognize that, as Mr. Justice Harlan wrote for the Court, "No cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries." (*Railroad Trainmen* v. *Terminal Co.,* 394 U.S. 369, 386.) But by the same token, in determining whether the statute here violates the First Amendment, the Court is "compelled by neither precedent nor policy to give any more weight to the epithet ['secondary pressure'] than [it has] to other 'mere labels of state law'." (*Cf. New York Times Co.* v. *Sullivan,* 376 U.S. 254, 269 and cases cited *id.* at notes 7 through 12.)

ucts of another producer * * * "; it thus forbids all truthful publicity which is directed against such trade mark, trade name or generic name. For example, the statement "Don't Buy Arizona Oranges Because Arizona Farm Workers are Paid Lower Wages Than Organized Farm Workers in California," would be forbidden, even though entirely truthful. Likewise, the statement "Don't Buy X-Brand Cantaloupes Because 95% Of Them Are Grown Under Non-Union Conditions [or because 95% of them are picked by child labor or by illegal immigrants]" would be forbidden even though completely true. Indeed, since the second sentence defines "permissible inducement or encouragement within the meaning of the section * * * " it would appear that any adverse publicity that does not "identif[y] the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute * * *—viz., truthful publicity against non-union produce as a class—would be forbidden.

Thus, a more accurate description of § 1385(B)(8) is that it outlaws much truthful publicity and all false publicity which induces persons not to purchase an agricultural product without regard to whether the publicity is primary or secondary.

It also is clear from the foregoing that the comparison which appellants draw between § 1385(B)(8) and § 8(b)(4)(ii)(B) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 158, provides no support for the Arizona statute. For, whereas the federal law, in terms and as construed in *Labor Board* v. *Fruit Packers (Tree Fruits)*, 377 U.S. 58, and its companion case *Labor Board* v. *Servette*, 377 U.S. 46, requires a finding that a secondary person has been threatened, coerced or restrained, the Arizona statute requires no such finding; it outlaws all publicity which falls

outside its narrow definition of what is truthful, honest and non-deceptive, regardless of its effect. Moreover, in deprecating the significance of the acknowledged difference that "the Arizona provision deals with all secondary consumer pressures, whereas *Tree Fruits* dealt only with picketing" (App. Br. 59-60) appellants not only assume the answer to the constitutional question which the majority of the Court did not reach in *Tree Fruits*, they treat as irrelevant the circumstance which Justice Harlan, in disagreement with Justice Black, regarded as "the very thing that renders [§ 8(b)(4)(ii)(B)] invulnerable to constitutional attack"—that under the federal statutes "other methods of communication are left open." (377 U.S. at 93, dissenting opinion.) And even if it is accurate to say that the Arizona law permits some consumer picketing which would be outlawed under *Tree Fruits* (App. Br. 60)[2] and which is unprotected by the First Amendment, an unconstitutional ban on speech is not saved because the state has in other respects failed to exhaust the full scope of its constitutional authority.

Of course, the fact that the Arizona law is significantly more restrictive than the federal law does not render the former unconstitutional. But these differences do refute appellants' effort to convey the suggestion that invalidation of the Arizona law would also entail striking down § 8(b)(4)(ii)(B) insofar as that section applies to secondary consumer publicity. And because of these differences, this case does not require ultimate resolution of the constitutional issue left open in *Tree Fruits*.[3]

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[2] Appellants give no illustration of consumer picketing which would be permitted by § 1385(B)(8) other than that which was held to be outside the ban of § 8(b)(4)(ii)(B) in *Tree Fruits*.

[3] For the same reason, *Hughes* v. *Superior Court*, 339 U.S. 460, the only case which has sustained the constitutionality of a ban

(2) From what is restrained and what is not, it appears that the actual purpose of § 1385(B)(8) is to further the commercial interests of non-union agricultural employers who wish to sell under a trade mark, trade name or generic name their produce jointly with growers who are involved in a labor dispute, or, perhaps, more broadly, to further the interests of all non-union employers not involved in a present "dispute"[4] with their employees.

As the court below recognized, *A. F. of L.* v. *Swing,* 312 U.S. 321, 325-326, squarely holds that the broader of these purposes is not a justification for the restraint imposed:

> That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiotmatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all

against consumer picketing, does not bear on the present case. Additionally, *Hughes* was decided on the premise that the picketing was engaged in to compel a store owner to engage in racially selective hiring contrary to the legal policy of the State. (See 339 U.S. at 463, 466-469.) Whether *Hughes* was rightly decided on its facts, and whether picketing addressed to consumers may be equated for constitutional purposes with union picketing as a signal to union members are questions properly left for consideration in a case in which consumer picketing is the focus of the challenged regulation.

[4] See § 1382.6 of the Arizona Act defining "dispute" discussed in 449 F.Supp at 463.

> engaged in the same industry has become a commonplace. *American Steel Foundries* v. *Tri-City Council,* 257 U.S. 184, 209. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's* case.

See also *Cafeteria Union* v. *Angelos,* 320 U.S. 293, 295-296.

And, we submit, that the line of authority beginning in *Virginia Pharmacy Bd.* v. *Va. Consumer Council,* 425 U.S. 748, forecloses the State from pursuing the narrower purpose by stemming the free flow of information to the public. The Court there began:

> Our question is whether speech which does "no more than propose a commercial transaction," *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U.S. at 385, is so removed from any "exposition of ideas," *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572 (1942), and from "'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,'" *Roth* v. *United States,* 354 U.S. 476, 484 (1957), that it lacks all protection. Our answer is that it is not. [425 U.S. at 762.]

After summarizing the "substantial individual and societal interests" (*id.* at 766) in the free flow of price information (see *id.* at 762-765), the Court surveyed the "justifications for the [price] advertising ban [at issue which] have to do principally with maintaining a high degree of professionalism on the part of licensed pharmacists" (*id.* at 766; see *id.* at 766-768). Those justifications were found to be constitutionally insufficient because:

[O]n close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information. There is no claim that the advertising ban in any way prevents the cutting of corners by the pharmacist who is so inclined. * * *

It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the "professional" pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price. They will go from one pharmacist to another, following the discount, and destroy the pharmacist-customer relationship. They will lose respect for the profession because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what.

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. [425 U.S. at 769-770.]

As the Court was quick to add "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. Cf. *Parker* v. *Brown,* 317 U.S. 341 (1943)." (425 U.S. at 770.) Thus, while the State can prohibit price competition, it cannot permit businessmen an option between a low-price, limited-service policy or a high-price, full-service policy, recognize the consumer's freedom to choose between the two, and then attempt to further the interests of those who provide full-service at high cost by stemming the free flow of price information to consumers. However else the State may regulate commercial conduct, it may not do so by regulating free speech in order to insulate from the public's informed judgment the class of businessmen who selects the option favored by the State.

Indeed, as the Court recognized in *Linmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85, the First Amendment does not "permit a municipality to prohibit the posting 'For Sale' or 'Sold' signs when the municipality acts to stem what it perceives as the flight of white homeowners from a racially integrated community" (*id.* at 86) although "[t]here can be no question of the importance of achieving [the] goal * * * [of] stable racially integrated housing" (*id.* at 94):

> The Township Council here, like the Virginia Assembly in *Virginia Pharmacy Bd.,* acted to prevent its residents from obtaining certain information. That information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families. The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as

> the homeowners' self-interest and the corporate interest of the township: they will choose to leave town. The Council's concern, then, was not with any commercial aspect of "For Sale" signs—with offerors communicating offers to offerees—but with the substance of the information communicated to Willingboro citizens. If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally." *Virginia Pharmacy Bd.* denies government such sweeping powers. [431 U.S. at 96-97]

See also *Bates* v. *State Bar of Arizona*, 433 U.S. 350. (The "publication in a newspaper of [a lawyer's] truthful advertisement concerning the availability and terms of routine legal services * * * may not be restrained." (*Id.* at 384).)

It follows, we submit, that the State may not suppress attempts to inform the general public that the X-brand of produce is entirely or in part non-union, or is picked entirely or in part by workers receiving less than union wages, or is grown entirely or in part by struck employers, coupled with a request not to buy. Consumers who base their buying decisions on their judgment as to whether the seller's business practices are constructive or anti-social, like consumers who buy on the basis of the price or quality of the product, act entirely within their rights. The premise of *Virginia Pharmacy Bd.* is that since the consumer has a right to choose he has a correlative right protected by the First Amendment to receive information pertinent to that choice. And, the Court there made it plain that this First Amendment right is not overcome by the state's concern that the informed consumer will make a choice that harms the commercial interests of competitors in a free market who exer-

cise the option favored by the State. If the State cannot keep the public ignorant of price information in the interest of the "professional" pharmacist or of the fact that property is for sale to stem the flight of white homeowners from a racially integrated community, it surely cannot do so to facilitate joint marketing efforts by produce growers, some or all of whom are non-union.

For the reason just stated, it is sufficient for present purposes to equate the "speech that does 'no more than propose a commercial transaction' " at issue in *Virginia Pharmacy Bd.* (425 U.S. at 771, n. 24) with appeals not to buy to protest the seller's business policies of social moment. But, the simple commercial offer to sell is entitled to only limited First Amendment protection as the Court, reaffirming *Virginia Pharmacy Bd.*, made clear in *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 455-456:

> We have not discarded the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

In contrast, the right of both management and labor to persuade the *public* to support their side during a labor dispute is entitled to "the same * * * constitutional * * * protection

* * * as any other lawful cause." (*Thomas* v. *Collins*, 323 U.S. at 538.)[5]

That the State here seeks on a basis insufficient to interdict even commercial offers to bar "free discussion concerning the conditions in industry and the causes of labor disputes * * * indispensible * * * to shape the destiny of modern industrial society" (*Thornhill*, 310 U.S. at 103), therefore compels the conclusion that § 1385(B)(8) is unconstitutional.

[5] We underline the word "public" because the Court in *Virginia Pharmacy Bd.* noted the "speech of labor disputants of course, is subject to a number of restrictions" and "expressed no views on [the] complex subject [of the] * * * constitutionality of restrictions upon speech in [that] special context." (425 U.S. at 748, n.17.) A review of the cases since *Thornhill*, suggests that the labor dispute context is "special" for First Amendment purposes only in that it has brought to fore, with particular force and immediacy, two generally applicable principles:

> First, where the State makes certain action unlawful "advocacy * * * directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (*Brandenburg* v. *Ohio*, 395 U.S. 444, 447) may be forbidden. Thus, where the State has forbidden concerted refusal to work for certain purposes picketing directed at union members subject to union discipline seeking such refusals may constitutionally be forbidden. (E.g. *Giboney* v. *Empire Storage Co.*, 336 U.S. 490; *Electrical Workers* v. *Labor Board*, 341 U.S. 694.)
>
> Second, it has never been doubted that the First Amendment does not protect threats of reprisal or of force. And, just as the picketing cases show that the government may take cognizance of the particular characteristics of the union-member relationship, so, cases such as *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, show that the government in regulating employer speech may "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear" (*id.* at 617).

Neither of these principles is applicable here.

(3.) Appellants appear to acknowledge (App. Br. 62-64) that § 1385(B)(8) would be unconstitutional if it outlawed untruthful publicity which was not wilfully or recklessly untrue, in other words uttered with "malice" in the sense of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280. The repeated contention that the Arizona courts could construe this provision as containing the *New York Times* standards would be at best disingenuous if the State were later to contend that § 1385(B)(8) is not to be so construed, or that such construction is not necessary to save it.[6]

The proposition is, however, of sufficient general importance that it merits elaboration on our part, particularly since this Court has carved out a category of speech which is protected by the First Amendment but to which the *New York Times* standard does not apply. That, of course, is the area of "speech that does 'no more than propose a commercial transaction'" (*Virginia Pharmacy Bd.*, 425 U.S. at 771,

[6] Appellants urge that the District Court should have abstained from deciding the constitutional issues raised in this case pending possible narrowing construction of the various challenged statutory provisions by the Arizona state courts. We leave to the appellees the demonstration of why that course should be rejected. But, in the event the State's argument prevails, one observation regarding the abstention problem does seem in order.

We submit that where a federal court abstains from deciding a challenge to the constitutionality of a state or local law, it should determine whether the delay inherent in abstention is likely to result in the loss of constitutional rights, and if so, it should protect the plaintiffs (and those on behalf of the suit is brought, if plaintiffs are suing in a representative capacity or if the case has been certified as a class action) against enforcement of the statute during the clarifying state proceeding. The need for such relief is particularly acute where the plaintiffs have raised a substantial claim that the challenged statute is unconstitutionally vague or overbroad; in those situations the uncertainty of the statute's scope restrains the exercise of constitutional rights, and, if the court

n. 24. See also *Bates* v. *State Bar of Arizona*, 433 U.S. at

abstains without protecting the plaintiffs during the pendency of state proceedings, preserves that uncertainty and thus its adverse impact on the exercise of constitutional rights. This is too great a price to pay for the benefit of enabling the state courts to give the statute a limiting and therefore saving construction, particularly since there is an alternative available which protects both the plaintiffs and the state.

Indeed, it was recognized in *Baggett* v. *Bullitt*, 377 U.S. 360, 378-379, that this very effect of vagueness militates against abstention. That decision and many others recognize the high constitutional interest in a prompt determination of whether a particular statute or other governmental direction would entail unconstitutional inference with rights guaranteed by the First Amendment (*Freedman* v. *Maryland*, 380 U.S. 51, 59; *Carroll* v. *Princess Anne*, 393 U.S. 175, 182-184; *Blount* v. *Rizzo*, 400 U.S. 410, 421; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 561-562.) To condition an order delaying further proceeding in the federal case by protecting the plaintiffs for conduct engaged in during the pendency of the state court proceeding protects that constitutional interest while accommodating that of the state in having is own courts construe the statute in the first instance, and that of the federal courts in avoidance of any unnecessary decision of constitutional questions. This is simply an exercise of power and duty of the court of equity to do equity to both sides. (Compare *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528, and cases cited *id.* at 532. *cf. Boys Markets* v. *Retail Clerks*, 398 U.S. 235, 254; *Hecht Co.* v. *Bowles*, 321 U.S. 321, 330.)

As was noted in *Bellotti* v. *Baird*, 428 U.S. 132, a case heavily relied on by appellants, "This Court often has remarked that the equitable practice of abstention is limited by considerations of 'the delay and expense to which application of the abstention doctrine inevitably give rise.' *Lake Carriers' Assn.* v. *MacMullen*, 406 U.S., at 509, quoting *England* v. *Medical Examiners*, 375 U.S. 411, 418." (428 U.S. at 150.) The Court added, "The importance of speed in resolution of the instant litigation is manifest. Each day the statute is in effect, irretrievable events, with substantial personal consequences, occur. Alhough we do not mean to intimate that abstention would be improper in this case were certification not possible, the availability of certification greatly simplifies the analysis." (*Id.* at 151.) Arizona does not have a certification procedure, but the cost

383.) That distinction rests on the recognition "that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." (425 U.S. at 772, n. 24 continued; 433 U.S. at 383-384.) Such commercial information is more "durable than other kinds" because a speaker who seeks to "disseminate information about a specific product or service that he himself provides * * * presumably knows more about [it] than anyone else" (*id.*), and because, as "advertising is the *sine qua non* of commercial profits, there is therefore little likelihood of its being chilled by proper regulation and forgone entirely" (*id.*). Neither of these considerations pertain to the speech regulated by § 1385(B)(8).

of abstention can be reduced even more greatly by the exercise of the equitable authority to protect the plaintiffs against enforcement of the state statute pending a definitive resoluion of the state law questions by the state courts. This was the course followed by the District Court and approved by this Court in *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167. Mr. Justice Harlan wrote:

> Because of its findings, amply supported by the evidence, that the existence and threatened enforcement of these statutes worked great and immediate irreparable injury on appellees, the District Court's abstention with respect to Chapters 33 and 36 proceeded on the assumption *"that the defendants will continue to cooperate, as they have in the past, in withholding action under the authority of the statutes until a final decision is reached. . . ." 159 F.Supp., at 534. In this Court counsel for the appellants has given similar assurances with respect to the three statutes presently before us, assurances which we understand embrance also the intention of these appellants never to proceed against appellees under any of these enactments with respect to activities engaged in during the full pendency of this litigation. *While there is no reason to suppose that such assurances will not be honored by these or other Virginia officials not parties to this litigation, the District Court of course possesses ample authority in this action, or in such supplemental proceedings as may be initiated, to protect the appellees while this case goes forward.* [360 U.S. at 178-179, emphasis supplied.]

The union that criticizes a producer's labor policies and asks customers not to buy has the same problems of verification as the reporter, the commentor or any other third person.

And even if it is assumed that some disparagement of a product by others is nevertheless entitled to less protection than the *New York Times* standards provide, that further exception would not save § 1385(B)(8) for several reasons: First, although "there is little likelihood of [commercial advertising] being chilled by proper regulation and forgone entirely" (*id.*), this Court has recognized that speech in labor disputes would be chilled if it were subject to a strict test of truth. (*Linn* v. *Plant Guard Workers,* 383 U.S. 53; *Letter Carriers* v. *Austin,* 418 U.S. 264.) To be sure, the Court there adopted the *New York Times* standards "by analogy, rather than under constitutional compulsion" (383 U.S. at 65; 418 U.S. at 272), but those decisions reflect this Court's appreciation of the realities which render speech in labor disputes more vulnerable to sanctions than commercial advertisement and are here relied on solely for that proposition. Second, as we have emphasized, § 1385(B)(8) covers inducements not to buy which provide information of broader social significance than a mere proposal for a commercial transaction. Third, the *Virginia Pharmacy Bd.* exception is addressed to legislation designed to protect consumers against deception. (See 425 U.S. at 771, text preceding note 24.) The defenders of § 1385(B)(8) do not contend that it is even consumer-oriented. Their asserted justification shows that the provision is designed for the protection of producers as a class.[7]

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[7] Most consumers of Arizona produce are, of course, citizens of other States. Cf. *Bigelow* v. *Virginia,* 421 U.S. 809, 822-824.

C. Section 1385(B)(8) suffers from an additional constitutional infirmity in that it is entirely one-sided in its application. Appellants have proffered no justification whatsoever for outlawing publicity which induces the public not to purchase certain products, while imposing no restraints on publicity which induces the public with precisely the opposite language to purchase that product. Producers and those economically or ideologically allied with them remain entirely free to proclaim that they deserve the public's support because of their labor policies, or because of other "socially desirable" behavior. Yet, it is forbidden to urge consumers and retailers not to buy because some or all the produce was grown under substandard labor conditions, or even because the workers were denied their rights under the Arizona labor relations statutes.

It is settled constitutional law that such disparity of treatment must be independently justified even if the justification for the restraint on speech is sufficient to sustain an evenhanded bar. This Court's fullest discussion of that requirement is *Police Department of Chicago* v. *Mosley,* 408 U.S. 92. In striking down a Chicago ordinance which forbade picketing or demonstrations in a public way within 150 feet of any primary or secondary school building (during certain times) but excepting labor picketing from that ban, the Court held:

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. * * *

[The Court here cited *Cohen* v. *California*, 403 U.S., 15, 24, and its precursers.]

Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas" and government, must afford all points of view an equal opportunity to be heard. • • •

The late Mr. Justice Black, who thought that picketing was not only a method of expressing an idea but also conduct subject to broad state regulation, nevertheless recognized the deficiencies of laws like Chicago's ordinance. This was the thrust of his opinion concurring in *Cox* v. *Louisiana*, 379 U.S. 536 (1965):

> "[B]y specifically permitting picketing for the publication of labor union views [but prohibiting other sorts of picketing], Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Id.*, at 581.

We accept Mr. Justice Black's quoted views. Cf. *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 76 (1964) (Black, J., concurring). [408 U.S. at 95–98, footnote omitted.]

In *Mosley* the Court held that the Chicago ordinance violated the Equal Protection clause of the Fourteenth Amendment, though recognizing that "the Equal Protection claim in this case is closely intertwined with First Amendment interests." (408 U.S. at 95.) Two subsequent cases, which expressly followed *Mosley*, struck down state laws which restricted the presentation of one side of a public question but not another as violative of the First Amendment. In *Madison Sch. Dist.* v. *Wisconsin Emp. Rel. Comm'n.*, 429 U.S. 167, the Court held:

> To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required [by state law] to discriminate between speakers on the basis of their employment, or the content of their speech. See *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972). [429 U.S. at 175-176, footnote omitted.]

And, again, last term in *Bellotti, supra*, the Court held:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972). If a legislature may direct business corporations to "stick to business," it also may limit other corporations—religious, charitable, or civic—to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment. Especially where, as here, the legislature's suppression of speech suggests an attempt to give one

side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended. [435 U.S. at 784-786, footnotes omitted.]

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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